91-1931

No. ____

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

STEVEN H. LAWRENCE,

Petitioner,

v.

MARS, INCORPORATED,

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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QUESTION PRESENTED

1. Whether the Court of Appeals for the Fourth Circuit erred in holding, in conflict with the decisions of other circuits, that a plaintiff in a case alleging a discriminatory discharge from employment must show that he was performing to the employer's expectations and satisfaction "at the time of the discharge" in order to satisfy the "qualifications" element of the *McDonnell-Douglas* analysis?

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Steven H. Lawrence, by his attorney, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App. 1a-10a) is reported at 955 F2d 902. The opinion of the district court (App. 20a-21a) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on January 31, 1992 (see App. 1a). A timely petition for rehearing was denied by order entered on March 3, 1992 (App. 12a). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTE INVOLVED

1. Section 701(j) of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. 2000e(j) provides in pertinent part:

> The term "religion" includes all aspects of religious observance and practice, as well as belief, unless an employer demonstrates that he is unable to reasonably accommodate to an employee's or prospective employee's religious observance or practice without undue hardship on the conduct of the employer's business.

2. Section 703(a) of Title VII of the Civil Rights Act of 1964, as amended, provides in pertinent part:

> It shall be an unlawful employment practice for an employer—
>
> (1) to fail or refuse to hire or discharge any individual or otherwise to discriminate against any individual with respect to his compensation his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex or national origin...

STATEMENT

1. *The Undisputed Facts of Record.* The following facts are undisputed on the record before the district court.

a. *Background.* The Jewish High Holidays of Rosh Hashanah (the Jewish New Year) and Yom Kippur (Day of Atonement) are among the most sacred days of the year in the Jewish religion; and are observed by secular as well as observant Jews by, among other things, refraining from work on those days.

Petitioner Steven H. Lawrence is Jewish and has observed the Jewish High Holidays at all material times. The sincerity of Lawrence's religious beliefs and practices is unchallenged in this litigation. J.A. 64.

Respondent Mars, Inc. is a multi-national corporation which is based in McLean, Virginia, and which is engaged through its subsidiaries in the manufacture and marketing of candy, pet food and other products. App. 2a.

"McLean Weeks" is a series of meetings of Mars, Inc. executives and associates from around the world and is an institution peculiar to the Mars family of corporations. McLean Weeks were considered "very important" by Mars, Inc. J.A. 39, 48; 134-135. The testimony was that McLean Weeks (J.A. 134-135):

> was the most important time for Mars during the year as a staff person. You were required to be there, be in attendance, be supportive in any way that the Office of the President or any of the senior staff needed you to help...
>
> Mars employees would tell me that no matter how you felt, you would get yourself into work and you would be there during McLean Weeks. It was very important meeting and considered very important by the Office of the President.

McLean Weeks meetings were considered so important to Mars, Inc., that Ian Lockyer, the Vice President for Personnel, and other long term executives, never missed any McLean Weeks meetings in their many years of employment at Mars, Inc. See, J.A. 360.

Mars, Inc. has a policy of hiring executive level personnel "to fill a permanent job"; that is, "for the long term", and plans to keep executive level employees "as long as performance is satisfactory, subject to a lot of economic conditions." J.A. 428-429; 351, Lockyer Dep. pp. 56-58. In addition, Mars, Inc. has a policy of advising employees of all ranks of any problems with performance, and providing counseling, and a probationary period, usually of 90 days, to determine whether performance has improved, and only then of discharging the employee. J.A. 336.

The policy is so strong that Mars, Inc. had not terminated any junior executive level employee from its employment prior to the facts giving rise to this suit. J.A. 345.

Steven Lawrence held a MBA in Finance from Farleigh Dickinson University in 1981, with a 3.96 grade point average, was employed by IBM from September, 1980 through June, 1986, and taught at Iona College during two of those years. J.A. 301, 125.

b. *Employment and Performance through August, 1988.* Lawrence was hired by Mars, Inc. on July 21, 1986, as its Risk Manager. As Risk Manger, Lawrence's responsibilities included the cost-effective purchase of insurance policies and the allocation of insurance costs among its subsidiaries. Lawrence performed his duties as Risk Manager under the general supervision of Robert A. DeMaria, to whom he reported. App. 2a.

As Risk Manager of Mars, Inc. from July, 1986 through October, 1988, Lawrence spent approximately eighty percent (80%) of his time in working with personnel of the subsidiaries of Mars, Inc. in the United States, Europe and other locations, and the remaining twenty percent (20%) in working with "vendors." J.A. 136-137.

Johnson & Higgins, one of the "vendors" assisting Mars, Inc. with the purchase of insurance, was paid on a straight commission basis as a percentage of the total premiums paid by Mars, Inc. J.A. 145.

Phyllis Flack was an insurance broker for Johnson & Higgins, who was part of the team that serviced the Mars account under Paola Carega's direction until August 1988 when Mr. Carega left Johnson & Higgins and Mr. Duncan took his place. J.A. 75.

Lawrence's work was well received by his superiors at Mars, Inc., and he received a merit promotion in July, 1987, approximately one year after his employment. J.A. 308-309.

In 1987 Mars, Inc. (through a letter prepared by Lawrence for DeMaria's signature and signed by DeMaria) had threatened to terminate their relationship with Johnson & Higgins and three other vendors, because of costs and inadequate performance. J.A. 138-141. The relationship with one of the other vendors was in fact terminated shortly thereafter. J.A. 141.

Subsequent to that letter, Lawrence developed a cost savings concept and worked with representatives of Johnson & Higgins to effectuate the reduction of the premiums to be paid by Mars, Inc. in 1988. He obtained annual savings to the Mars, Inc. family of companies of approximately $1,000,000 in premiums for 1988. J.A. 141-149. Approximately $800,000 of the savings came from premiums for policies brokered by Johnson and Higgins, of which approximately $570,000 was attributable to international policies for which Phyllis Flack was the account representative. J.A. 144-145.

In both 1986 and 1987, there was no conflict between the McLean Weeks meetings, and the Jewish High Holidays, and Lawrence sought and received leave to observe those Holidays. App. 2a. His requests were treated as routine and granted by his immediate superior and the personnel office, without notice to or comment by any higher official. J.A. 195-196.

In early 1988, DeMaria advised Lawrence that he and his immediate superior, Eric Bumstead, had decided to bring to the attention of the Office of the President (that is, Forrest Mars and John Mars) a violation by Johnson & Higgins of their agreements with Mars, Inc., which might result in the termination of their relationship with Mars, Inc. J.A. 149-150. Later, Lawrence was advised by DeMaria that "J & H was lucky. He said that the Office of the President was in a good mood. they decided not to terminate the relationship." J.A. 150.

In May, 1988, DeMaria advised Lawrence that he was well regarded by Mars, Inc., and that his prospects for promotion, both immediate and long term were bright. App. 3a.

Mr. DeMaria recommended Lawrence for a second "merit increase" by memorandum of 16 June 1988. J.A. 324. On or about August 4, 1988, John and Forest Mars approved DeMaria's recommendation, and the merit increase was made effective on August 4, 1988. J.A. 325.

No other Mars, Inc. executive in pay zones V and VI had ever received two merit increases in twenty-five months. J.A. 349-350. The Office of the President of Mars considered two successive merit increases in that time to be an "accolade" for exceptional performance. J.A. 425-426, 428.

Paolo Carega, the account executive for Mars of Johnson and Higgins, worked very closely with Lawrence from July, 1986 through the end of July, 1988. He believed that Lawrence was performing his job very effectively, and had received no complaints about Lawrence. J.A. 73-82.

In August, Lawrence advised DeMaria that he preferred to have someone from Johnson & Higgins other than Ms. Flack accompany him on a scheduled trip to Europe. DeMaria agreed to his suggestion, and told Lawrence "don't worry about it." J.A. 170-171. Lawrence's request that another representative of Johnson & Higgins accompany him on the trip was honored, in accordance with the industry practice of attempting to meet the requests of representatives of important clients. J.A. 165.

c. *Events from August through Discharge in October, 1988.* In 1988, the Jewish High Holidays of Rosh Hashanah and Yom Kippur coincided with a scheduled "McLean Weeks" series of meetings.

On August 12, 1988, Mr. Lawrence wrote a note to Mr. Demaria entitled "Religious Holidays" stating his intent to take leave for the Jewish High Holy Days of Rosh Hashanah and Yom Kippur. He noted in the request that because the Jewish High Holy Days coincided with McLean Weeks meetings, "more parties than usual need to be informed." J.A. 393.

Unlike his requests for leave in 1986 and 1987, his 1988 request for leave to observe the Jewish High Holidays was presented orally to Forrest Mars, Jr., Co-President of Mars, Inc., by a representative of the personnel office of Mars, Inc. Mr. Mars stated that Lawrence could make up the missed time working on Christmas day or other holidays or he could charge the time off to leave. J.A. 39, 48-49, 160.

Lawrence took time off for Rosh Hashanah on September 12 and 13. J.A. 161. Upon returning to work on September 14, Lawrence was told by Jacques Guerts, who has served a general counsel in Europe for Mars, Inc. since 1972, that observance of the Jewish New Year is "not a good excuse. There is no excuse for missing McLean Weeks. The only excuse is if you are dead, and even that is not a good excuse." App. 3; J.A. 161-162. Lawrence did not find the remark humorous, but stated that it was phrased in a way which made it sound like an attempt at humor, or at fatherly advice. J.A. 198.

Lawrence observed Yom Kippur the following week on September 21, 1988, notwithstanding the comments of Mr. Guerts. J.A. 162.[1]

When Lawrence asked DeMaria in September if he could travel with Duncan, rather than Flack, for a trip scheduled for October, DeMaria insisted that he travel instead with Flack. He did not give any reasons for his change in view since August. J.A. 165-166, 844-845.

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1. On September 16, 1988, two days after Mr. Guerts' comments, and the Friday of the same week that plaintiff had observed the Rosh Hashanah holiday, Mr. DeMaria took Ms. Flack to dinner at the River Club on the Mars Inc. expense account. J.A. 818-819. Neither Mr. Lawrence nor any of the other members of the Johnson & Higgins team was invited and, although she does not recall what was said, Ms. Flack admits that they might have discussed Mr. Lawrence. J.A. 839-846. She could recall no other after hours meeting with DeMaria during her time with Johnson & Higgins. *Id.* This testimony was not formally before the district court at trial. The meeting of Mr. DeMaria and Ms. Flack and the deposition of Ms. Flack was however brought to the attention of the district court in opposition to the motion for summary judgment.

On the trip to Europe, in October, 1988, Lawrence, Demaria, Flack, Duncan and Nick Hutton were at dinner in London, and Mr. Lawrence raised his voice when making and repeating a statement to Ms. Flack. J.A. 177. Mr. DeMaria and Ms. Flack returned to the United States the next day. Mr. Lawrence apologized to Mr. Duncan for any offense he might have caused Ms. Flack and proceeded to make the trip without Ms. Flack. J.A. 171.

It was common practice for John and Forest Mars and others at Mars, Inc. to raise their voices to Mars, Inc. associates, both within and without the company. J.A. 104, 177. Raising one's voice to a vendor or to an "associate" (employee) of Mars, Inc. was not and is not a violation of any policy of Mars, Inc. J.A. 448-449.

When Mr. Lawrence returned from his trip, on October 31, 1988, he was barred from his office and was informed that he had been summarily discharged from his employment.[2] J.A. 110-113, 331-334. Lawrence was advised by his DeMaria and Bumstead that they "did not like the direction he was taking the Risk Management Department", and they "questioned his ethics." J.A. 174. Lawrence asked how he could be taking the Department in the wrong direction when he and DeMaria had always worked together, and he had always obtained DeMaria's concurrence, they replied that he was too tough and too demanding of Johnson & Higgins and another insurance company. J.A. 175. They also indicated

2. A meeting between DeMaria and Richard Duncan, the account representative of Johnson & Higgins, took place on October 26, 1988. Duncan noted the apparent incompatibility of Lawrence and Flack, and proposed to replace Flack with another representative of Johnson & Higgins. Replacement of a vendor representative with another vendor representative was "absolutely" common practice in the insurance brokerage industry. J.A. 811. The possibility that Lawrence's employment might be terminated as a result of his request never entered Duncan's mind; Duncan was surprised when that turned out be the result of his meeting with Lawrence. J.A. 918. Although there was deposition evidence in the record about this meeting which was before the district court on the motion for summary judgment, none of it was presented to the district court at trial, because the defendant offered no evidence at trial.

that he had gone out with brokers, Johnson & Higgins, at their expense. That also surprised Lawrence since DeMaria had done the same thing. J.A. 175-176. The dinner with Phyllis Flack was apparently also mentioned as a reason. J.A. 177.

Mars, Inc. did not counsel him, place him on probation or provide him with any chance to reform prior to the discharge. Indeed, Lawrence had never been advised of any problems with his performance, interpersonal skills or conduct until the date of his discharge. J.A. 167.

None of the conduct set forth by Mars' officials as the basis for the discharge violated any Mars policy that was ever expressed to Mr. Lawrence prior to his termination. J.A. 410. None of the conduct of Mr. Lawrence violated any written policy of Mars, Inc.

Mars Inc. did not conduct an investigation of the conduct of Lawrence prior to its decision to terminate his employment or prior to his discharge from employment. The only investigation conducted by Mars, Inc. was after suit had been threatened, and did not take place until mid-November 1988; and even then did not check with the Mars associates with whom Lawrence had worked. J.A. 180-181.

c. *District Court Proceedings.* After exhausting his administrative remedies by filing and prosecuting a claim before the Fairfax County Human Rights Commission, Lawrence filed this suit in the Eastern District of Virginia in December, 1990, alleging violations of his rights under Title VII, the Fairfax County Human Rights Ordinance, and his contractual rights under the law of Virginia. J.A. 36-44.

In its Answer, Mars, Inc. admitted that Forrest Mars was consulted about the Lawrence request for leave for the Jewish High Holidays in 1988, and instructed that he could work on Christmas instead. J.A. 48-49. Mars, Inc. admitted that Lawrence's absence from the McLean Weeks meetings did not cuase it any substantial difficulty or hardship. J.A. 41,49. Mars, Inc. did not assert in its Answer or elsewhere that it had just cause to terminate Lawrence's employment.

In discovery, John and Forrest Mars conceded that executives are hired for the long term, that is, during satisfactory performance, except for economic factors. J.A. Vol II 428-429. They also admitted that two merit increases in 25 months is an accolade for exceptional performance. J.A. 425-426. The Lockyer deposition showed that no other executive had received such an accolade. J.A. II 349-350.

After full discovery, the defendant Mars, Inc., moved for summary judgment. Mars contended that Lawrence had not made a prima facie case, because he was "not satisfying Mars' legitimate performance expectations when he was terminated" and that Lawrence therefore had not shown that he was qualified to hold the position of Risk Manager. J.A. 516-517. Mars also contended that "Lawrence cannot prove that Mars' stated reasons for his termination were a pretext for religious discrimination." J.A. 517. Apparently in recognition of the fact that DeMaria had admitted in deposition that the position held by Lawrence had been upgraded in his absence, and then downgraded again, and later was filled by Larry Warner (J.A. 726-728; J.A. 878), Mars did not argue that Lawrence's position had been filled by an observant Jew, or that the position did not remain open, or that the position had changed in any significant way.

The district court (Judge Cacheris), although dismissing plaintiff's state law claims, ruled that Lawrence's evidence raised a factual dispute concerning his Title VII claim, sufficient to warrant a trial on the merits. J.A. 20-21.

Trial was held on June 4, 1991, before Judge Claude M. Hilton. Plaintiff introduced the testimony of Paola Carrega, Richard Myers, Annette McLaughlin, Roberta Lawrence and Steven Lawrence, and the deposition testimony of George Kuklevsky, a representative of Marsh and McLennan. In addition, he numerous exhibits showing his performance, his merit increases, and the deposition testimony of the Vice President for Personnel, Ian Lockyer, and the deposition

testimony of John Mars and Forrest Mars, Jr., Co-Presidents of Mars, Inc.

Carega testified that while he was responsible for the Mars account with Johnson & Higgins during the two years that Lawrence was risk manager, from July 21, 1986 through August 1, 1988, Lawrence did a good job and no one from Johnson & Higgins (or elsewhere) had ever complained to him or raised any concerns about Lawrence or any personality or other problems they may have had with him or with his conduct with Phyllis Flack, or any other Johnson & Higgins employee. J.A. 73-82.

George Kuklevsky, a representative of Marsh & McLennan, another insurance brokerage firm which was a major vendor of Mars, Inc., also worked closely with Lawrence during that time period, and believed that he was an excellent Risk Manager for Mars, Inc. Kuklevsky Dep.

Richard Myers Weinstein testified that when he spoke to DeMaria shortly after Lawrence's discharge from employment, DeMaria told him that the reason for the discharge was improper conduct by Lawrence, and that he would not have any problem using Weinstein as a recruiter to fill the vacancy caused by Lawrence's discharge. J.A. 96-97.

Annette McLaughlin testified that Lawrence was well liked and well regarded by his co-workers at Mars, Inc., and that she had worked with him and others as a part of the team. J.A. 107-108. She testified that it was common practice at Mars for the Co-Presidents and others to raise their voices in discussions at headquarters. J.A. 104.

The deposition testimony of Lockyer and John and Forrest Mars had established the policies and practices of hiring people for the long run, and retaining executive level personnel. See p. 3 above. And the Mars, Inc. policy of giving employees a warning and an opportunity including a probationary period of up to 90 days to correct any problems was established by documentary evidence. J.A. 336.

Lawrence testified about his career at Mars, the favorable recognition that he had received, his writing a request for leave for the Jewish Holidays, his surprise that his request came to the attention of Forrest Mars, his conversation with Jacques Guerts, and his shock and confusion when he was fired for stated reasons that made no sense to him. J.A. 118-158.

At the close of plaintiff's case in chief, Mars, Inc. moved for judgment under Rule 41(a), "for failure of the plaintiff to make a prima facie case" on the grounds that "he has to show that he was performing to his employer's expectations and that he was replaced by someone outside the protected group." J.A. 222-223.

Counsel for the plaintiff noted that defendant had conceded that Lawrence had been replaced, making implicit reference to the deposition testimony of DeMaria that Lawrence had been replaced by Warner. J.A. 225. Counsel for the defendant stated that there was no agreement that he "was replaced by somebody else to do the same function." J.A. 229.

Judge Hilton granted the defendant's motion to dismiss for failure to make a prima facie case. He stated (J.A. 14-15):

> You do have to show some facts that there was discrimination before you can make any kind of inference ... .
>
> I don't find that there is a prima facie case made in this case. Had I looked at this summary judgment earlier, and if there was a motion to renew this summary judgment, I would grant it.

He went on to hold (J.A. 16-17):

> I find that there just isn't sufficient facts to go forward to establish a prima facie case that he was performing up to his employer's expectations or that he was replaced by someone outside his group. I don/t find that there is testimony in this case that he, that his actual position was replaced.
>
> And the motion to dismiss under Rule 41(b) will be granted.

d. *Decision of the Court of Appeals.* In its decision of January 31, 1992, the Court of Appeals recognized that the district court had granted the motion the Rule 41 motion because "Lawrence had failed to establish a *prima facie* case of discrimination" in that he had not shown that "he was performing to his employer's expectations at the time of his discharge." App. 5a-6a.

The Court of Appeals affirmed the decision of the district on the ground that Lawrence had failed to establish a *prima facie* case on the ground that Lawrence "did not establish that his performance was satisfactory at the time of his discharge", and therefore the evidence produced by Lawrence was "insufficient for the trier of fact to have reasonably inferred that Lawrence's discharge was the result of religious discrimination." App. 6a.

REASONS FOR GRANTING THE WRIT

The Fourth Circuit in this case has held that unless an employee can demonstrate that "he was performing to his employer's expectations at the time of his discharge", or that "his job performance was satisfactory at the time of his discharge" a plaintiff cannot satisfy the "qualifications" element of a prima facie case under the *McDonnell Douglas* analysis[3] in a discharge case brought to enforce the non-discrimination provisions of Title VII of the Civil Rights Act of 1964. However, an employee who was discharged cannot prove that his performance was satisfactory to his employer "at the time of his discharge", because the employer who has chosen to discharge an employee will almost always have a stated, non-discriminatory reason for doing so at the time of the discharge. In effect, therefore, the Fourth Circuit has held that direct evidence of discriminatory purpose is necessary to make a *prima facie* case in discharge cases under Title VII, and has largely eliminated the indirect method of proof set forth in *McDonnel Douglas* and the later cases

3. *McDonnell Douglas* v. *Green*, 411 U.S. 792, 802 (1973); *Furnco Construction Corp.* v. *Waters*, 438 U.S. 567, 577; *Texas Department of Community Affairs* v. *Burdine*, 450 U.S. 248, 253, 254 (1981). See also, *U.S. Postal Service* v. *Aikens*, 460 U.S. 711 (1983).

interpreting and applying that analysis. In so doing, the Fourth Circuit has entered into conflict with the decisions and with the rulings of other circuits for establishing a *prima facie* of discharge.

Together with the decision of the Fourth Circuit in an age discrimination case, *EEOC* v. *Clay Printing Co.*, 955 F.2d 936 (4th Cir. No. 91-2576, Feb. 5, 1992), decided a few days later[4], the Fourth Circuit has rendered the indirect method of proof inoperative in that Circuit in the overwhelming majority of employment discrimination claims of discriminatory discharge.

The *McDonnell Douglas* analysis requires only that a plaintiff who alleges discriminatory refusal to hire must show that he was "qualified" for a job in which the employer was seeking applicants. See, note 2 above. That analysis recognizes that Title VII prohibits subtle as well as blatant discrimination, and that with the enactment of Title VII few employers will provide the employee with direct evidence of discriminatory purpose. This Court has set a relatively low threshold for establishing a *prima facie* case so that the finder of fact can hear and assess all of the relevant evidence to determine indirectly, that which can rarely be shown directly. *United States Postal Service Board of Governors* v. *Aikens*, 460 U.S. 711, 714 n.3, 716, 717 (1983). Unless reversed, the ruling of the Fourth Circuit will defeat that objective, at least in cases brought there.

1. The decision of the Fourth Circuit in this case is in conflict with the decisions of other circuits. In cases involving allegations of discriminatory discharge of employees from employment, the other courts of appeals have considered evidence of performance in determining the qualifications

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4. *Equal Employment Opportunity Commission, Applicant* v. *Clay Printing Co.*, No. A-875 in this Court. The petitioner understands that by Order of this Court dated on or about May 20, 1992, the Solicitor General was granted until July 2, 1992, within which to file a petition for writ certiorari on behalf of the Applicant Equal Employment Opportunity Commission in that case.

branch of the *prima facie* case under the *McDonnell-Douglas* analysis. The other circuits have however directed their attention to performance over a reasonable period of time, rather than performance "at the time of discharge", and to the objective evidence of performance, rather than the employer's subjective expectations and views. *Legrand* v. *University of Ark. at Pine Bluff*, 821 F.2d 478 (1987), cert. den. 485 U.S. 1034; *Lynn* v. *Regents of the University of California*, 656 F.2d 1337, (9th Cir. 1981); *Hybert* v. *The Hearst Corporation*, 900 F.2d 1050 (7th Cir. 1990). In *Legand* and *Hybert* the courts of appeals found probative the performance appraisals made by the employer several months before their dismissals, which showed that they met the normal requirements of their job. *Legand, supra,* 821 F.2d at 481; *Hybert, supra,* 900 F.2d at 1051-1052, 1054 (positive evaluations until 9 months before termination).

Those cases hold that a showing of qualifications under the *McDonnell-Douglas* line of cases may be established by the use of performance evaluations and other criteria related to the performance of an incumbent employee over a period of time, rather than at the moment the employer decides to discharge the employee; and that objective evidence is sufficient to satisfy the qualifications element, for considering the subjective views of the employer is inherently a part of evaluating the genuineness of the employer's stated reasons, and therefore should be evaluated by the finder of fact at trial. See *Legand, supra* 821 F.2d at 481; *Lynn, supra,* 656 F.2d at 1344-1345.

a. Application of the standards set forth in the decision below to the case at bar shows both the unfairness of the standards, and the difficulty which other plaintiffs who lack direct evidence of discriminatory purpose will face in the Fourth Circuit under those standards. Petitioner Lawrence had a masters of business administration with 3.9 grade point average, and had such outstanding performance in his first 25 months in the job of risk manager that his employer granted him in August, 1988, the "accolade" of a second merit

increase, an accolade that no other junior executive of the employer had ever received. See above pp. 9-10. His technical competence was so excellent that the defendant never challenged it below. App. 15a.

As recently as August, 1988, the respondent Mars, Inc. had in effect recognized petitioner Lawrence as a star employee, who had saved Mars, Inc. over $1,000,000 in insurance premiums. See, pp. 5, 9-10 above.

The only question raised to his performance was his ''interpersonal skills'', that is, his ability to get along with the vendors who sold him insurance. App. 15a-16a. He was however never criticized in writing or orally for that lack of skills before the day of his discharge. He never violated any written employer standard, or insofar as he knew, any standard of any kind.

If petitioner Lawrence cannot satisfy the ''qualifications'' branch of the *McDonnel-Douglas* analysis, it is difficult to visualize a discharged employee who can.

b. If a *prima facia* case is established, the employer must present ''admissible evidence'' of legitimate non-discriminatory reasons for the decision (*Aikens*, 460 U.S., *supra*, at 714). When the employer has done so, the plaintiff can, by cross-examination of the defendant's witnesses, and the introduction of further evidence attempt to persuade the finder of fact that the stated reason is not the real reason. By holding that there was no *prima facie* case, the courts below denied petitioner a ''fair chance to rebut the non-discriminatory'' evidence, if any, used to justify the decision. *Mitchell* v. *Baldridge*, 759 F.2d 80, 89 (D.C. Cir. 1985).

In language traditional for stating the effect of failure to make a *prima facie*, the Court of Appeals for the Fourth Circuit held below that ''these facts are insufficient for the trier of fact to have reasonably inferred that Lawrence's discharge was the result of religious discrimination.'' App. 6a.[5] Yet why

5. In light of the holding that the district court correctly ruled that the Lawrence had failed to make a *prima facie* case, and the traditional

other than protecting the sanctity of McLean Weeks meetings, the holy days of Mars, Inc., and insuring that other executives will continue to be sure to attend, would Mars, Inc. summarily discharge a junior executive whose record was exemplary and who had just saved the employer over $1,000,000 in insurance premiums a year?[6] While the petitioner's evidence did not compel a verdict for the plaintiff, it is in our view equally far from facts which compel a verdict for the defendant. Yet that is what the court of appeals below held.

2. Discrimination on grounds of religious observance is unlawful under Title VII, unless the employer shows that to make an accommodation would constitute an "undue hardship" on the employer. Sec. 701(j) of Title VII, 42 U.S.C. 2000e(j); *Equal Employment Opportunity Commission* v. *Ithica Industries*, 849 F.2d 116, 118 (4th Cir. 1989) (en banc). Lawrence's absence from work on the three days in question

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restatement of that holding in the quoted language, the statement of the court of appeals that the "findings" of the district court are protected unless clearly erroneous (App. 6a) is puzzling, and is inconsistent with the holding and the stated reasons for the holding of the court of appeals in this case.

6. The appellate courts have recognized several types of objective evidence that may be persuasive of discriminatory purpose, including whether the employee was warned about the conduct and given the opportunity to improve, departure of the employer from usual procedures, absence of any fixed or reasonably objective standards for evaluating the employee, and failure to make a independent inquiry until after the fact. *Christie* v. *Foremost Ins. Co.*, 785 F.2d 584 (7th Cir. 1986); Schlei and Grossman, Employment Discrimination Law, p. 599 (Second Ed. 1983). In addition to the highly favorable rating of Lawrence less that three months before his discharge, each of the other factors was present in this case: (1) departure from the usual policy of counseling an employee before discharging him (J.A. 336) and the departure from usual practice in granting religious leave, by referring Lawrence's 1988 request for leave for 3 days to the co-President of this multi-billion dollar enterprise; (2) lack of objective standards by which an employee's conduct is measured; (3) lack of any investigation until several weeks after the decision and after the discharge.

In addition, of course, was the statement of Guerts, which could reasonably have been interpreted as a veiled threat from the Office of the President, through a trusted counselor, that if he did not return to work on Yom Kippur he would be sorry.

concededly caused Mars, Inc. no hardship. Discrimination by Mars, Inc. against petitioner because he observed the Jewish High Holidays during the days of McLean Weeks meetings would therefore violate Title VII.

The appellate courts which have addressed the issue set forth a standard for the *prima facie* case of religious discrimination because of religious observance different from the standard in cases of discrimination because of race, sex, or national origin. They have held that a prima facie case is established in such circumstances if the plaintiff shows (1) that he had a bona fide religious belief; (2) that he advised the employer of it and the conflict with the normal requirements of the job; and (3) there was a causal link between the religious obligation and the adverse action of the employer. *Turpen* v. *Mo. Kansas Tex. Ry.*, 736 F.2d 1022, 1026 (5th Cir. 1984), and cases cited; *Proctor* v. *Consolidated Freightways*, 795 F.2d 1472 (9th Cir. 1986). See also, *Ansonia* v. *Philbrook*, 479 U.S. 60, 65-66 (1986); *Manual of Employment Discrimination Law and Civil Rights Actions in the Federal Courts*, by Judge Charles R. Richey, pp. A-14-15 (Federal Judicial Center, Nov. 1986). That *prima facie* case is closely akin to that for showing retaliation for engaging in other activities protected by Title VII, *Mitchell* v. *Baldridge*, 759 F.2d 80, 86 (D.C. Cir. 1985), and cases cited. Accord: Brief for Mars, Inc., below, p. 32; *Ross* v. *Communications Satellite Corp.*, 759 F.2d 355,364 (4th Cir. 1985).

Under that standard, as in cases alleging retaliation against an employee for engaging in an activity protected by Section 704 of the Act (42 U.S.C. 2000e-3), a causal connection between the religious observance and the adverse action may be shown, among other things, by the closeness in time between the protected activity and the adverse action of the employer, and evidence that the employer treated the employee differently after than before learning of the protected activity.[7] See *Schlei & Grossman*, Employment Discrimination

7. Lawrence here did submit adequate evidence of a "causal connection" between the discharge and his religious observance of the

Law, pp. 558-560 (Second Ed. 1983) and cases cited there, and in Five Year Supplement.

The standard set forth by the courts above is the appropriate one for establishing a *prima facie* case of discrimination against an incumbent employee because of the observance of a religious obligation. For in such circumstances the qualifications of the employee are shown by the hiring of the employee and his satisfactory performance prior to the time of the protected activity. And the name and religious practices of the replacement of the discharged employee will rarely shed any light on the employers motive for taking the adverse action.

The court of appeals below declined to adopt the standard for showing a *prima facie* case in other circuits, and entered into a further conflict with them. App. 6a-7a. In so doing, however, the court failed to acknowledge the existence of a conflict, or even any tension, between the rulings of the other circuits and the decision below, and failed to offer any reason why those rulings should not be followed.

3. The decision of the Fourth Circuit in *Equal Employment Opportunity Commission* v. *Clay Printing Co.*, 955 F.2d 936 (4th Cir. 1992), indicates that the decision in this case is part of a pattern of decisions by the Fourth Circuit to restrict the role of the finder of fact in employment discrimination cases, by the *McDonald-Douglas* standard has not been satisfied. In the

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Jewish High Holidays (See, *contra,* App. 7, n. 2). It was conceded that Forrest Mars had been informed of Lawrence's intent to take leave during the Jewish High Holidays, and that he had openly taken that leave. Under the standards of the other circuits, a *prima facie* case of a causal connection is made when the plaintiff offers evidence that the employer had knowledge that the employee engaged in the protected activity, and the adverse personnel action took place shortly after that activity. *Mitchell* v. *Baldridge*, 759 F.2d 80, 86 (D.C. Cir. 1985). Indeed, that was the law in the Fourth Circuit, prior to the decision below. *Williams* v. *Cereberonics*, 871 F.2d 452, 457 (4th Cir. 1989). In addition, De Maria's denial in September of Lawrence's second request not to travel with Flack, in spite of his approval of the first request a month earlier (see pp. 6-8 above), shows a different treatment of Lawrence after the observance of the High Holidays in September. See also, fn. 6 above.

Clay Printing case, the Court held that direct evidence that an employer believed that older employees cost more, and therefore "they made too much money for what they were producing" and that "if employees had been there 10 years or more, they needed to move on" was not probative of age discrimination. 955 F.2d at 942. The Fourth Circuit held, moreover, that an employee aged 60 who had never received a reprimand or complaint and was replaced by a person aged 46 did not satisfy the requirements of *McDonnel-Douglas* that the replacement be other than a member of the protected group. 955 F.2d at 948, 943. Apparently, the Fourth Circuit is concerned that too many cases will need to be decided by the finder of fact, after seeing and hearing the witnesses on direct and cross-examination, and after reviewing the exhibits. Yet such fact finding by the finder of act on the basis of all the evidence is precisely what is called for by the *McDonnell-Douglas* line of cases. *Anderson* v. *Bessemer City*, 470 U.S. 564 (1985); *United States Postal Service Board of Governors* v. *Aikens*, 460 U.S. 711.

CONCLUSION

For the reasons set forth above, this Court should grant the petition and review the decision below. If certiorari is sought and granted in *Equal Employment Opportunity Commission* v. *Clay Printing*, *supra*, the two cases should be heard together, for they involve closely related issues.

Respectfully submitted,

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Attorney for the Petitioner,
STEVEN H. LAWRENCE

Appendix

PUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

STEVEN H. LAWRENCE,
Plaintiff-Appellant,
v.
MARS, INCORPORATED,
Defendant-Appellee.

NO. 91-1151

Appeal from the United States District Court
for the Eastern District of Virginia, at Alexandria.
Claude M. Hilton, District Judge.
(CA-90-1628-A)

Argued: October 28, 1991
Decided: January 31, 1992

Before MURNAGHAN and NIEMEYER, Circuit Judges, and HARVEY, Senior United States District Judge for the District of Maryland, sitting by designation.

Affirmed by published opinion. Senior Judge Harvey wrote the opinion, in which Judge Murnaghan and Judge Niemeyer joined.

COUNSEL

ARGUED: David L. Rose, Washington, D.C., for Appellant. Christine Hope Perdue, HUNTON & WILLIAMS, Fairfax, Virginia, for Appellee. **ON BRIEF:** Joshua N. Rose, Washington, D.C., for Appellant. Charles F. Martel, HUNTON & WILLIAMS, Fairfax, Virginia, for Appellee.

OPINION

HARVEY, Senior District Judge:

Steven H. Lawrence appeals from orders of the district court granting summary judgment in favor of Appellee as to Counts II and III of his complaint and dismissing Count I at trial pursuant to Rule 41(b), F.R.Civ.P. Finding no error, we affirm.

I.

Appellee Mars, Inc. (''Mars'') a multi-national corporation which is based in McLean, Virginia and which is engaged primarily in the manufacture and marketing of candy and pet food. On July 21, 1986, Mars hired Appellant Steven Lawrence to be its Risk Manager. Mars and Lawrence never executed a written contract of employment.

As Risk Manager at Mars, Lawrence's responsibilities included the cost-effective purchase of insurance policies and the allocation of insurance costs among subsidiaries. Mars commonly utilized the services of brokers to purchase insurance policies, and Johnson & Higgins was the primary broker which Mars utilized during Lawrence's employment.

Lawrence was of the Jewish faith. In 1986 and 1987, Lawrence took paid leave to observe the Jewish holidays of Rosh Hashanah and Yom Kippur. No question was raised by any one at Mars concerning the leave taken by him for these religious observances. In the summer of 1987, Lawrence received a merit increase in his salary. During 1987, Lawrence and his immediate supervisor, Robert DeMaria, worked together to reduce the amount of insurance premiums paid by Mars.

In May of 1988, another corporation offered Lawrence a risk management position with an annual salary of $125,000. At that time, Lawrence was making $70,000 annually at Mars.

Lawrence testified that when he advised DeMaria of this offer, DeMaria responded by telling Lawrence that:

> [w]hile...the decision was mine and that there were no guarantees at Mars, he advised me that I was perceived very well at Mars, and that he thought my prospects at Mars were bright. He stated that the way things were going, I would be promoted to [a higher salary] zone shortly, and that there is a good chance that I would be his successor when he retired.

Lawrence thereupon decided to decline the job offer and remain with Mars.

In 1988, Mars adopted a new policy for employees who wished to take time off for religious observances. Whereas such an employee was formerly permitted to receive full pay less a punctuality bonus, the new policy required that time off for religious holidays be counted as a vacation day or "floating holiday."

In August of 1988, Lawrence advised DeMaria that he intended to take paid leave for the September Jewish holidays. He was then told of the new policy. In 1988, Rosh Hashanah coincided with regularly-scheduled conferences of Mars executives known as "McLean Weeks." During "McLean Weeks," executives located at Mars' headquarters in McLean, Virginia confer with Mars managers from the United States and abroad. Mars conducts "McLean Weeks," which last about one or two weeks each, approximately four or five times a year. Lawrence observed Rosh Hashanah on September 12 and 13, 1988. When he returned to work on September 14, he spoke with Jacques Geurts, an attorney for Mars stationed in Europe. Geurts asked Lawrence where he had been the previous two days, and Lawrence answered that he had been observing Rosh Hashanah. According to Lawrence, Geurts then stated that "[t]here is no excuse for missing McLean Weeks. The only excuse is if you are dead, and even that is not a good excuse." Lawrence interpreted these comments as an attempt at humor or friendly advice. It is conceded that Geurts

never had supervisory authority of any kind over Lawrence during his employment at Mars. Lawrence then took leave for Yom Kippur the following week.

During the last two weeks of October of 1988, Lawrence travelled to Europe on behalf of Mars. Accompanying him on this business trip were DeMaria and two representatives of Johnson & Higgins, namely, Richard Duncan (a Vice President) and Phyllis Flack (an international account executive). Lawrence did not like Flack.[1] During dinner one night at a restaurant in London with DeMaria, Duncan, Flack and Lawrence all present, there was a verbal altercation between Flack and Lawrence. Flack felt insulted, cancelled her travel plans and returned to the United States with DeMaria the next day.

On October 26, 1988, Duncan met with DeMaria to complain of Lawrence's lack of interpersonal skills. Following his meeting with Duncan, DeMaria discussed the status of Lawrence's employment with four other Mars officials, namely, DeMaria's own supervisor, the Vice President for Personnel and Organization, the Personnel and Organization Manager, and an attorney. These five persons decided to terminate Lawrence's employment. This decision was thereafter approved by Mars' two co-presidents. It is not disputed that Geurts played no role in the discharge of Lawrence.

When he returned to work in the United States on October 31, 1988, Lawrence was informed by DeMaria that he was being discharged effective immediately. DeMaria informed Lawrence that he was being terminated because Mars disagreed with the manner in which Lawrence was handling the risk management program, because Lawrence had used his position at Mars to obtain personal benefits and because Mars officials had lost trust in Lawrence as a manager. DeMaria also told Lawrence that he believed that Johnson & Higgins was considering resigning the Mars account. Lawrence

1. According to Lawrence, Flack, who was also Jewish, reminded him of his mother.

protested his termination to Mars executives and asked for a mutually equitable separation agreement. Lawrence did not then nor during the weeks following his termination contend that he had been fired because of his religious observances in September.

In January of 1989, Lawrence filed a charge of religious discrimination with the Fairfax County Human Rights Commission. Lawrence alleged that Mars had discriminated against him by terminating his employment in retaliation for the religious observance taken in September of 1988. On February 12, 1989, the Commission determined that there were no reasonable grounds to support Lawrence's charge of discrimination. On September 7, 1990, the Equal Opportunity Employment Commission (the "EEOC") made a similar determination and dismissed the charge which Lawrence had filed with it. A right-to-sue letter was thereafter issued.

On December 5, 1990, Lawrence filed suit in the United States District Court for the Eastern District of Virginia. In Count I of his complaint, Appellant alleged that Mars had violated Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e, *et seq.*, by terminating his employment in retaliation for his having observed the Jewish high holidays in the fall of 1988. Count II asserted a similar claim brought under the Human Rights Ordinance of Fairfax County, Virginia. Count III alleged a breach of contract under Virginia law.

District Judge James C. Cacheris thereafter granted Appellee's motion for summary judgment directed to Counts II and III. As to Count II, the district court concluded that the Human Rights Ordinance of Fairfax County does not create a private right of action. Count III was dismissed on the ground that Appellant's breach of contract claim was precluded by the interaction of the statute of frauds and Virginia's rebuttable presumption concerning terminable-at-will employment.

Count I of the complaint then came on for trial before District Judge Claude M. Hilton. At the conclusion of Lawrence's case-in-chief, Mars moved to dismiss pursuant to

Rule 41(b), F.R.Civ.P. The district court granted Mars' motion to dismiss, reasoning, *inter alia*, that Lawrence had not established a *prima facie* case of employment discrimination under Title VII.

II

Appellant Lawrence first contends that the district court erred in finding that he had failed to establish a *prima facie* case of discrimination under Title VII. In its oral opinion of June 4, 1991, the district court found that Lawrence had failed to establish a *prima facie* of discrimination because he had not shown (1) that he was performing to his employer's expectations at the time of his discharge, or (2) that he was thereafter replaced by a person outside the protected group. These factual findings may be set aside only if clearly erroneous. *Anderson v. Bessemer City, North Carolina*, 470 U.S. 564, 572 (1985).

To establish a *prima facie* case of discriminatory discharge under Title VII, a plaintiff must, *inter alia*, (1) prove that his job performance was satisfactory, and (2) present direct or indirect evidence whose cumulative probative force supports a reasonable inference that his discharge was discriminatory. *See Williams v. Cerberonics, Inc.*, 871 F.2d 452, 455-456 (1989); *Holmes v. Bevilacqua*, 794 F.2d 142, 147 (4th Cir. 1986) (*en banc*). On the record here, we conclude that Appellant failed to meet either of these burdens. He did not establish that his job performance was satisfactory at the time of his discharge. Furthermore, he did not present direct or indirect evidence from which a trier of fact could infer religious discrimination. At trial, Appellant did little more than show that a lawyer employed by Mars in Europe had in a joking manner criticized him for having missed a portion of "McLean Weeks," and that he had been fired within two months of his observance of religious holidays in September of 1988. These facts are insufficient for the trier of fact to have reasonably inferred that Lawrence's discharge was the result of religious discrimination.

Appellant argues that this Court should apply in this case the three-prong standard set forth in *Ross v. Communications Satellite Corp.*, 759 F.2d 355, 364 (4th Cir. 1985). In *Ross*, we held that an employee, to establish a *prima facie* case of retaliatory discrimination, was required to prove (1) that the employee engaged in protected activity; (2) that the employer took adverse employment action against the employee, and (3) that a causal connection existed between the protected activity and the adverse action. *Id.* at 365.

Appellant's reliance on Ross is misplaced. That case involved a claim of retaliation on the part of the defendant because of the filing by the plaintiff of charges of discrimination with the EEOC. Although the sequence of proof and burdens prescribed by *McDonnell-Douglas Corp. v. Green*, 411 U.S. 792 (1973) are applicable in retaliation cases brought under Title VII, a somewhat different *prima facie* case must be proved. This case, however, presents a claim of religious discrimination which must properly be analyzed under the traditional test first set fourth in *McDonnell Douglas* and refined by this Court in its *Holmes* and *Williams* decisions.[2]

For these reasons, we conclude that the district court did not at the trial err in granting under Rule 41(b) Appellee's motion to dismiss Count I of the complaint.

III

Appellant also challenges the district court's entry of summary judgment in favor of Appellee as to Count II of the complaint which was brought under the Fairfax County Human Rights Ordinance (the "Ordinance"), Fairfax County Code, Chapter 11. Contending that the Ordinance creates a private right of action, Lawrence argues that the district court erred in granting summary judgment in favor of Mars on Count II.

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2. In any event, Appellant would not have prevailed under the *Ross* standard. He did not show a causal connection between the religious observances he took and the termination of his employment.

The Ordinance is contained in Chapter 11 of the County Code. Various sections deal with enforcement provisions. Section 11-2-12(a) provides that a complaint may be filed with the County Human Relations Commission by a person alleging a violation of the Chapter. This Section says nothing about an alternative forum in which an aggrieved person might file a complaint. The Commission is empowered by Section 11-1-16 to seek in court through the County Attorney, with the approval of the Board of Supervisors, prevention of or relief from a violation of the Chapter.

The language in the County Code which ostensibly authorizes private individuals to take unilateral action is found in Section 11-1-20, under the heading "Non-Exclusive Remedy," as follows:

> [a]ny person who is aggrieved by any act prohibited herein may bring an appropriate action in a court of competent jurisdiction to seek damages...arising out of any act prohibited herein as provided for by any applicable law. Nothing herein shall prevent any person from exercising any right or seeking any remedy to which he or she might otherwise be entitled....

On its face, Section 11-1-20 seems to permit a private right of action. However, a more plausible interpretation is that the provision in question does not create a cause of action but merely preserves any otherwise existing cause of action like a suit under Title VII.

We accept this latter construction of the Ordinance. Section 11-1-20 is found under the title "Non-Exclusive Remedy." Under Section 11-1-12 the Commission is the only forum where an aggrieved person may file a complaint. The Commission is then authorized under certain conditions to seek relief for a violation of the Chapter. It would be incongruous if the Ordinance were interpreted as allowing a private plaintiff unilaterally to enforce its provisions when Section 11-1-16 requires the Commission to receive a

recommendation from the County Attorney and authorization from the Board of Supervisors before bringing suit itself.

A fair reading of Section 11-1-20 in the light of other provisions of the Ordinance convinces us that this Section simply stands for the proposition that bringing a complaint before the County Human Relations Commission is not an aggrieved party's exclusive remedy; he or she can still bring an action under another anti-discrimination statute, like Title VII. Accordingly, we conclude that the Ordinance does not create a private right of action and that Mars was entitled to summary judgment as to Count II of the complaint.

IV

The district court also entered summary judgment in favor of Mars as to Count III, which alleged a breach of contract under Virginia law. The district court concluded that Appellant could not "avoid the combined effect of Virginia law concerning terminable-at-will employment and its Statute of Frauds...." Appellant contends (1) that material issues of fact exist concerning whether his employment contract was terminable only for just cause, and (2) that the doctrine of equitable estoppel applies to this case.

Appellant's contentions are without merit. Under Virginia law, "where no specific time is fixed for the duration of the employment, there is a rebuttable presumption that the hiring is terminable at will." *Miller v. SEVAMP, Inc.*, 362 S.E.2d 915, 917 (Va. 1987). An employee can rebut the presumption of at-will employment by demonstrating that his employer promised to terminate his employment only for just cause. *Id.*

In opposing Mars' motion for summary judgment, Lawrence failed in this case to produce evidence indicating that Mars breached an existing oral employment agreement between the parties. Lawrence was employed on an at-will basis. Although the Mars decision to discharge him was a sudden one, it had the right to do so under applicable Virginia law. Even if the oral agreement had contained the provision claimed by Lawrence, just cause existed here for his discharge.

Lawrence was discharged for reasons which are fully supported by the proof furnished by Mars in moving for summary judgment. Furthermore, the Virginia statute of frauds would bar Lawrence's claim for breach of the employment agreement which he claims to have existed.

Finally, Lawrence argues that the doctrine of equitable estoppel applies to this case because the representations of DeMaria in the summer of 1988 constituted an enforceable promise which he relied on in declining another job offer. This contention is likewise meritless. DeMaria's statements were plainly insufficient as a matter of law to constitute reasonable reliance by Lawrence. DeMaria made no definite promise to Lawrence but instead merely advised him that his prospects at Mars were good and that he might receive a pay increase in the future. DeMaria explicitly stated that "there were no guarantees at Mars."[3] Accordingly, the district court's entry of summary judgment as to Count III must also be affirmed.

For all these reasons, the judgment of the district court is affirmed as to all counts of the complaint.

AFFIRMED

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3. Assuming *arguendo* that DeMaria's statements were not indefinite, Virginia law would nonetheless preclude Appellant from invoking principles of estoppel in this case because the job offer was made by a third party rather than by Mars. *See Sartin v. Mazur*, 375 S.E.2d 741, 742 (Va. 1989).

Filed: March 2, 1992

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 91-1151
(CA-90-1628-A)

STEVEN H. LAWRENCE, *Plaintiff—Appellant,*

versus

MARS, INCORPORATED, *Defendant—Appellee*

ORDER

The Court amends its opinion filed January 31, 1992, as follows:

On page 2, fourth full paragraph, line 3—the words "any one" are corrected to read "anyone."

On page 5, fourth full paragraph, line 4—the word "case" is added after the words "prima facie."

For the Court—By Direction

/s/ John M. Greacen
CLERK

Filed: March 3, 1992

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 91-1151
(CA-90-1628-A)

STEVEN H. LAWRENCE, *Plaintiff—Appellant,*

v.

MARS, INCORPORATED, *Defendant—Appellee*

On Petition for Rehearing with Suggestion for Rehearing In Banc

Appellant filed a petition for rehearing with suggestion for rehearing in banc. No member of the Court requested a poll on the suggestion for rehearing in banc, and the original judicial panel voted to deny the petition for rehearing.

The Court denies the petition for rehearing with suggestion for rehearing in banc.

Entered at the direction of Judge Murnaghan, with the concurrence of Judge Niemeyer and Judge Harvey, United States District Judge sitting by designation.

For the Court,

John M. Greacen
CLERK

IN UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA

ALEXANDRIA DIVISION

STEVEN H. LAWRENCE,
Plaintiff,
v.
MARS, INCORPORATED,
Defendants.

C.A. NO. 90-1628-A

This matter came on as a trial before the court. At the conclusion of the plaintiff's evidence, the defendant moved for dismissal pursuant to Rule 41(b) of the Federal Rules of Civil Procedure. For the reasons stated from the bench, it is hereby

ORDERED that defendant's motion to dismiss pursuant to Rule 41(b) of the Federal Rules of Civil Procedure is **GRANTED** and this case is **DISMISSED**.

UNITED STATES DISTRICT JUDGE

Alexandria, Virginia
June 5, 1991

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF VIRGINIA

ALEXANDRIA DIVISION

STEVEN H. LAWRENCE,
Plaintiff,
v.
MARS, INCORPORATED,
Defendants.

C.A. NO. 90-1628-A

TRIAL TRANSCRIPT

June 4, 1991

Before: Claude M. Hilton, Judge

APPEARANCES:

David L. Rose and Alan Rosenblum, Counsel for Plaintiff
Christine Perdue and Charles Martel, Counsel for Defendant

Q And so, your reasons are based on an inference, are they, rather than anything direct?

MS. PERDUE: Your Honor— I will withdraw an objection to that question.

A The answer is yes.

MR. ROSE: I don't have anything further at this time, Your Honor. I think that this witness may wish to testify again in rebuttal if there is any need for that.

THE COURT: All right. Thank you, you may step own.

NOTE: The witness stood down.

THE COURT: Do you have any other witnesses?

MR. ROSE: No, Your Honor. We are— That's the case in chief for the defendant, for the plaintiff, excuse me.

THE COURT: All right.

MS. PERDUE: Your Honor, I would make a Rule 41 motion at this time to dismiss. I don't think the plaintiff has shown any right to relief on the facts and law under Title VII. His overall burden here is to show that he was discharged because of his exercise of his religious beliefs. I don't think he has shown any evidence to support that.

First of all, he has to show a prima facie case that he was performing to his employer's expectations and that he was replaced by someone outside the protected group. There has been no testimony about his replacement.

And secondly, based on his own assessment of his job duties in which he has indicated he was required to have good communication skills, to be in daily contact with the brokers and to have good interpersonal interaction with those individuals, it is clear from his own testimony that he was not doing that.

We have not put his technical competence in issue, but what is in issue is his ability to manage the consultants and the

brokers who were critical to Mars' Risk Management program.

He has indicated here today that he had two reasons for filing a charge of religious discrimination. The first of those was to protect his reputation. And the second was because he disagreed with the reasons which were given to him. I think it is very telling that there is no mention at of any concern on his part that Mars had acted because of his exercise of his religious beliefs.

The only evidence he has is the alleged statement by Mr. Geurts. And if you give him the benefit of the doubt and assume that that statement was made, there is absolutely nothing to link it with the decision to discharge him. Mr. Geurts wasn't his supervisor. He has no evidence that Mr. Geurts spoke with anybody else at Mars. And I submit that he has to make that factual connection in order to carry his burden of proof. There is absolutely nothing else in this record that would support any inference of religious discrimination on the part of Mars.

I think what you have heard, and as the question from Mr. Rose indicates, Mr. Lawrence's case is all inference. It is all speculation. And there have not been any facts presented here today which would support a claim on his behalf. And for that reason I would ask that, move to dismiss his claim as conjecture.

MR. ROSE: Does the Court wish to hear argument? Your Honor, I made an error when I said we rested. We had intended to introduce the whole of Mr. George Kuklevsky's deposition, and we would like to do that. He is a broker from Marsh & McLennan, which is another major broker. And I had understood from plaintiff, from defendant that they did not object to the introduction of that deposition.

THE COURT: All right, that will be admitted.

MR. ROSE: The heart of our case, Your Honor, the Supreme Court cases say that the great majority of cases are

based on inference of a prima facie case does not require direct evidence. The Supreme Court in *Aikens* so ruled. We tie our case to the quote from Mr. Justice Rehnquist before he became Chief Justice in *Furnco Construction versus Waters*, 438 U.S. 567 at 577. And the quote is as follows: When all legitimate reasons for rejecting an applicant have been eliminated as possible reasons for the employer's action, it is more likely than not the employer, who we generally assume acts only with some reason, based his decision on impermissible considerations.

That is the heart of a normal Title VII case. This candidate was highly qualified. He had done extremely well. He had gotten two merit increases in 25 months, which the record shows he is the only person at Mars, Incorporated that ever got it. John Mars acknowledged that that was an accolade.

The evidence thus far shows that he saved over $1 million in premiums for Mars, Incorporated. That is what he was supposed to do. He was— He did what he was told, which is to be tough and to negotiate. He did nothing that his immediate supervisor, Mr. DeMaria, didn't do. He did nothing that violated any written principle.

There is a very strong— When John Mars was asked why they didn't give him a second chance, John Mars stated that it was because he was riding in a limousine that day in England. That is implausible that somebody would be fired for that reason.

It is implausible that someone would be, someone at Mars would be fired for raising one's voice to a vendor. John Mars admitted that it wasn't a violation of Mars principles either to raise one's voice to a vendor or to raise one's voice to an associate.

As far as the dinners are concerned, it is common practice in the industry, Mr. Carega took people to dinner, Mr. Duncan takes people to dinner. The evidence shows that

R,B&H takes people to dinner. And there is nothing at all unusual about that.

As far as the four portion standard, the hiring of substitute, it is undisputed in this record that there was a substitute hired and that he was not Jewish. And in a termination case, the Fourth Circuit in — I am sorry, the name of the case we cited in the proposed findings and conclusion, the name escapes me at the moment. It is a Hispanic name, Your Honor, it was a 1991 decision. But they said that you don't rigidly need the four part standard in any event.

And, therefore, we certainly have a prima facie case. That is essentially what Judge Cacheris ruled on the motion for summary judgment. And I think the Court should draw the inference from all the facts.

THE COURT: Well, what evidence is there in this case though? You can't just suspicion something. If you are going to have an inference that gets you anywhere, and you can draw inference from facts that are in the case, but where are the facts that have been presented that there was any religious discrimination?

MR. ROSE: Your Honor, there is nothing direct, and there normally is nothing direct. The facts —

THE COURT: I am just not sure of that. You tell me that, but you mean you can put an inference on nothing and a case goes forward?

MR. ROSE: That is exactly —

THE COURT: I find that very difficult to believe.

MR. ROSE: Your Honor, that's what the Court held in Aikens, that's what the Court held in *Furnco*, and that's the reason for the *McDonnell Douglas* —

THE COURT: I think you would find that the Courts say that you can only draw inferences from facts.

MR. ROSE: Of course.

THE COURT: What is there here that we can draw an inference on—

MR. ROSE: Your Honor, the facts are that he missed important meetings that Mars considered extremely important. Mr. Lockyer, whose deposition testimony is in evidence, never missed a meeting, he worked for the company for 19 years. Mr. Lawrence has testified— Mr. DeMaria, who testified on deposition that he never missed a McLean Weeks meeting. There is no— Mr. Bumstead never missed a McLean Weeks meeting—

THE COURT: He took the religious holidays in '86.

MR. ROSE: Yes.

THE COURT: He received a bonus, wasn't terminated. He took them in '87.

MR. ROSE: Didn't miss any meetings— McLean Weeks is like a holiday for Mars. And when that holiday comes in conflict with one's religious holy days, Title VII says that the, unless it is an undue hardship on the employer, that the employee's religious observances are key.

THE COURT: Well, what is the evidence in this case of that other than some statement by Geurts, who has really nothing to do with this defendant or this plaintiff, doesn't supervise him--

MR. ROSE: Geurts is a lawyer, Your Honor. He has worked with Mars for many years. It is normally assumed that lawyers don't make statements— He certainly wasn't making it on his own behalf. It is assumed that lawyers normally don't make statements on behalf of their, unless they are making it on behalf of their client. In this case the real client was John and Forrest Mars.

That's our view, Your Honor. We think we have amply made the prima facie case. The prima facie case is qualified, protected, and was terminated. And the reasons for the termination here we think are implausible, at least a finder of

fact would so determine. And it is conceded that he was replaced by somebody else to do the same function.

MS. PERDUE: Your Honor, I have two comments. The first is a factual one. It is not conceded that he was replaced by somebody else to do the same function.

And secondly, I direct the Court's attention to two decisions of the Fourth Circuit, *Ross versus Communication Satellite Corporation* and *Goldberg versus B. Green and Company*. Both of which state quite clearly that there must be specific facts, and unsupported allegations as to motives are insufficient. Genuineness means that the evidence must create a fair doubt, and wholly speculative assertions will not suffice. I understand those decisions to require that there be a factual basis, and I think they are directly on point.

All we have here is speculation and, as you pointed out, the comment of an individual who had no supervisory authority over Mr. Lawrence and no involvement whatsoever in the decision to terminate him. I don't think there is anything here, and I would ask the Court to dismiss.

THE COURT: Well, there is only one thing that troubles me a little bit about this motion, is that the burden of going forward with a prima facie case in a discrimination case, Title VII case, is not too troublesome. You don't have to show too much to get a prima facie case on. You do have to show some facts that there was discrimination before you can make any kind of an inference. There have to be facts upon which you can make an inference. The burden of a prima facie case isn't very strong before a defendant has to come back and show a legitimate reason for the termination. And then, of course, you have got to show that that was pretextual.

I don't find that there has been a prima facie case made in this case. Had I looked at this summary judgment earlier, and if there was a motion to renew this summary judgment, I would grant it.

The evidence in this case is this plaintiff was hired by Mars. He was there for about two years, without going to the specific dates. That he took off to observe the religious holidays in '86, and he received a bonus and his performance wasn't affected in any way, nobody said anything to him at all. He took the holidays in '87, the same thing occurred. No one has ever indicated any problem, according to the evidence that I have, that he could take the religious holidays.

On this occasion he was terminated by his testimony for the specific reasons that he was receiving entertainment dealing with or receiving dinners, perhaps not receiving entertainment, but receiving dinners from insurance brokers, two instances of what you would call rude conduct in dealing with insurance people. The plaintiff's own testimony is that the insurance broker Johnson & Higgins had threatened to take their business elsewhere. There are affidavits in this motion for summary judgment that indicate that that is the case and that is the reason for the termination.

That this plaintiff by his own testimony discussed with people at Mars the reason for his termination. He wrote some kind of response to the termination. Negotiated some severance pay. At no time was there any mention that this was done because of some kind of bias against his religion, because he took the religious holidays. He didn't go to Mars and say, you have terminated me because I took the holidays. He went in and argued that his conduct was proper for the reasons that they stated. No mention of it.

I find that simply putting into evidence this statement from Mr. Geurts that everybody has got to attend McLean Weeks or you have got big problems, just simply isn't sufficient opinion to put this whole case on, and that's where it lies. Geurts had no responsibility for the supervision of this plaintiff, had no responsibility in his termination.

I find there just isn't sufficient facts to go forward to establish a prima facie case that he was performing to his employer's expectations or that he was replaced by someone

outside his group. I don't find that there is testimony in this case that he, that his actual position was replaced.

And the motion to dismiss under Rule 41(b) will be granted.

And if we have no further business, we will adjourn until tomorrow morning.

HEARING CONCLUDED

I certify that the foregoing is a true and accurate transcription of my stenographic notes.

Norman B. Linnell, CP, CM, CE